

FILED

JAN 26 2010

DISCIPLINARY COMMISSION OF THE
SUPREME COURT OF ARIZONA
BY M. Smith

BEFORE THE DISCIPLINARY COMMISSION
OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A SUSPENDED MEMBER) Nos. 07-1629, 08-1904, 08-2189
OF THE STATE BAR OF ARIZONA)

MARK L. JOHNSON,
Bar No. 019505

RESPONDENT.

DISCIPLINARY COMMISSION
REPORT

This matter came before the Disciplinary Commission of the Supreme Court of Arizona on January 9, 2010, pursuant to Rule 58, Ariz.R.Sup.Ct., for consideration of the Hearing Officer's Report filed November 13, 2009, recommending disbarment, restitution, and costs.

Decision

Having found no facts clearly erroneous, the nine members of the Disciplinary Commission unanimously recommend accepting and incorporating the Hearing Officer's findings of fact, conclusions of law, and recommendation for disbarment, restitution, and costs of these disciplinary proceedings including any costs incurred by the Disciplinary Clerk's office.¹ The amounts of restitution are as follows:

Restitution

Joseph R. Farmer	\$1,175.00 ²
Brent and Deja Moseng	<u>\$1,081.87</u>

¹ The Hearing Officer's Report is attached as Exhibit A.

² The Hearing Officer recommended \$1,100.00; however the Commission determined that \$1,175.00 was the appropriate amount of restitution based on Hearing Transcript, Exhibit 1.

TOTAL:

\$2,256.87

RESPECTFULLY SUBMITTED this 26th day of January, 2010.

Jeffrey Messing/mps
Jeffrey Messing, Chair
Disciplinary Commission

Original filed with the Disciplinary Clerk
this 26th day of January, 2010.

Copy of the foregoing mailed
this 27 day of January, 2010, to:

Hon. H. Jeffrey Coker
Hearing Officer 6R
P.O. Box 23578
Flagstaff, AZ 86002-0001

Mark L. Johnson
Respondent
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and

Mark L. Johnson
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Shauna R. Miller
Senior Bar Counsel
State Bar of Arizona
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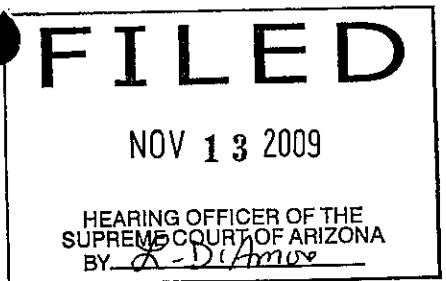
by: Deann Barker

/mps

EXHIBIT

A

**BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA**



IN THE MATTER OF A SUSPENDED
MEMBER OF THE STATE BAR OF
ARIZONA,

MARK L. JOHNSON,
Bar No. 019505

Respondent.

) File Nos. 07-1629, 08-1904, 08-2189
)
)
)
)

) **HEARING OFFICER'S REPORT**
)
)
)
)

PROCEDURAL HISTORY

1. Probable Cause Orders were signed on Counts One through Three on July 15, 2009. A Complaint was filed on August 4, 2009. The Respondent was served pursuant to Rule 47(c), Ariz.R.Sup.Ct., and the Notice of Service was filed on August 5, 2009. The undersigned Hearing Officer was assigned to this matter on August 6, 2009. An Initial Case Management Conference was held on August 25, 2009, wherein Bar Counsel and the undersigned were in attendance by phone, however Respondent failed to attend. Because Respondent failed to file an answer or otherwise appear, a Notice of Default was filed on September 1, 2009, and Respondent's default was entered on September 23, 2009. The matter proceeded by way of an Aggravation/Mitigation hearing on October 5, 2009. Respondent failed to appear at the Aggravation/Mitigation hearing.

FINDINGS OF FACT

2. At all times relevant, Respondent was a lawyer licensed to practice law in the state of Arizona, having been first admitted to practice in Arizona on May 21, 1999.¹
3. Respondent was suspended from the practice of law for six months and one day effective May 20, 2005, and to date has not applied for reinstatement.

COUNT ONE (File No. 07-1629 King)

4. On or about October 8, 2006, after he had previously been suspended by the Supreme Court of the state of Arizona, Respondent prepared a will for John William King ("Mr. King"). Mr. King passed away shortly after the will was executed.
5. After Mr. King's death, Respondent contacted Claudia D. Work and two other attorneys in her firm, regarding the probate of the King estate and at all times held himself out as the attorney who prepared the will.
6. Respondent also submitted a claim for payment of his legal fees against Mr. King's estate.
7. On or about September 19, 2007, Ms. Work searched the State Bar's website and found out that Respondent was suspended from the practice of law and reported the matter to the State Bar.
8. On March 12, 2008, the State Bar sent a letter to Respondent's address of record informing him that he was engaging in the unauthorized practice of law, and

¹ In that Respondent failed to respond to the Complaint in this matter, all allegations set forth in the Complaint are deemed admitted.

requested that he cease all activity and inform the State Bar of his compliance.

Respondent failed to respond.

9. In June 2008, the State Bar's staff investigator found a local address for Respondent. The staff investigator went to the address, confirmed that Respondent lived there and left a business card on the door.
10. Respondent contacted the staff investigator and claimed to be in Nevada and that he had health issues.
11. The staff investigator went to the address again in June 2009, but the landlord told him that Respondent had moved.
12. The staff investigator telephoned Respondent and left voice messages and sent an e-mail. Respondent did not respond.
13. The staff investigator also made two trips to an address in Scottsdale, Arizona, where Respondent was believed to have an office, but he was unable to locate the office.
14. On November 6, 2008, the State Bar sent a letter to Respondent to his address of record at his last known address, advising him that failure to cooperate with the State Bar is grounds for discipline and requesting a response within ten (10) days. The letter to Respondent was returned as not deliverable and Respondent failed to respond.

Conclusions of Law relative to Count One

15. Respondent's conduct as described above violates Rule 42, Ariz.R.Sup.Ct., specifically ERs 5.5(a) and 8.1(b), and Rules 31(b) and (c)(3), and 53(c), (d) and (f) as follows:

- a. Respondent practiced law in Arizona, while suspended.
- b. Respondent knowingly failed to respond to a lawful demand for information from the State Bar.
- c. Respondent failed to provide the State Bar with a current street address, telephone number or other current contact information.
- d. Respondent knowingly violated a court order when he practiced law while on suspension.
- e. Respondent refused to cooperate with the State Bar.
- f. Respondent failed to furnish information, or respond promptly, to an inquiry from the State Bar.

COUNT TWO (File No. 08-1904 Farmer)

- 16. In May 2005, Joseph R. Farmer hired and paid Respondent \$1,100 to prepare a Revocable Family Fortress Dynasty Trust.
- 17. In 2009, Mr. Farmer went to his banking institution to obtain a home equity line of credit through the trust and was told by the banking institution's legal department that he did not have a living trust with them and that the bank had only an Abstract of Trust on file.
- 18. The paperwork that Mr. Farmer received from Respondent indicated that the trust documents were in a fireproof safe in his office.
- 19. Mr. Farmer tried unsuccessfully to contact Respondent or anyone related to his law firm to retrieve the original trust documents or to find out if they were ever completed.

20. Mr. Farmer later learned that Respondent was suspended from the practice of law.
21. On July 9, 2008, the State Bar sent a letter to Respondent's address of record informing him that Mr. Farmer was attempting to contact him to retrieve the original trust documents and requesting that he contact the State Bar. Respondent failed to respond.
22. On November 6, 2008, the State Bar sent a letter to Respondent's address of record regarding his failure to respond and requesting a response within twenty (20) days. The letter was returned as not deliverable-unable to forward.
23. On June 15, 2009, the State Bar sent a letter to Respondent's address of record regarding his failure to respond and requesting a response by June 25, 2009. The letter was returned as not deliverable-unable to forward.
24. In June 2008, the State Bar's staff investigator found a local address for Respondent. As enumerated in Count One, the staff investigator went to the address, confirmed that Respondent lived there and left a business card on the door. Respondent contacted the staff investigator and claimed to be in Nevada and that he had health issues.
25. As enumerated in Count One, the staff investigator went to the address again in June 2009, and the landlord told him that Respondent had moved. The staff investigator telephoned Respondent and left voice messages and sent an e-mail. Respondent did not respond. The staff investigator also made two trips to an address in Scottsdale, Arizona where Respondent was believed to have an office, but he was unable to locate the office.

Conclusions of Law relative to Count Two

26. Respondent's conduct as described above violates Rule 42, Ariz.R.Sup.Ct., specifically ERs 8.1(b), and Rules 32(c)(3), 53(d) and (f) and 72(a) and (c) as follows:
- a. Respondent failed to notify his client of his suspension within ten (10) days of the judgment and order.
 - b. Respondent failed to return client property.
 - c. Respondent knowingly failed to respond to a lawful demand for information from the State Bar.
 - d. Respondent failed to provide the State Bar with a current street address, telephone number or other current contact information.
 - e. Respondent refused to cooperate with the State Bar.
 - f. Respondent failed to furnish information to, or respond promptly to, an inquiry from the State Bar.

COUNT THREE (File No. 08-2189 Moseng)

27. In March 2007, after he had previously been suspended by the Supreme Court of the state of Arizona, Respondent was hired by Brent and Deja Moseng, of Moseng Chiropractic ("the clients"), to assist them with updating their corporate status with the Arizona Corporation Commission ("Commission").
28. The clients met with Respondent on February 10, 2007, to hold the annual shareholders meeting and to discuss the corporation's status.

29. Respondent had previously reviewed the corporate records and informed his clients that fees needed to be paid and paperwork filed in order to return the company to active status with the Commission.
30. The clients were billed, and paid Respondent \$1,081.87.
31. The clients periodically checked with the Commission to see if their corporate status had changed and, as of December 8, 2008, it had not.
32. The clients then made numerous attempts to contact Respondent by telephone and left many messages to try and find out the status of the matter. Respondent did not return any of the telephone calls.
33. The clients were forced to hire another attorney and incur more fees to complete the work Respondent was hired and paid to do.
34. The clients believed that Respondent was an active attorney at the time they hired him.
35. On June 15, 2009, the State Bar sent a screening letter to Respondent at his address of record and at his last known address regarding the matter and requested a response within ten (10) days. The letters were returned as not deliverable-unable to forward.
36. As set forth in Count One, in June 2008, the State Bar's staff investigator found a local address for Respondent. The staff investigator went to the address, confirmed that Respondent lived there and left a business card on the door. Respondent contacted the staff investigator and claimed to be in Nevada and that he had health issues.

37. Again, as alleged in Count One, the staff investigator went to the address again in June 2009, and the landlord told him that Respondent had moved. The staff investigator telephoned Respondent and left voice messages and sent an e-mail. Respondent did not respond. The staff investigator also made two trips to an address in Scottsdale, Arizona, where Respondent was believed to have an office, but he was unable to locate the office.

Conclusions of Law relative to Count Three

38. Respondent's conduct as described above violates Rule 42, Ariz.R,Sup.Ct. specifically ERs 1.2, 1.3, 1.4, 1.5, 5.5(a), 8.1(b), and Rules 31(b) and 32(c)(3), and 53(d) and (f).
- a. Even though Respondent was suspended at the time of the representation, he was still obligated to ethically represent the clients, which he failed to do in violation of ERs 1.2, 1.3, 1.4, and 1.5.
 - b. Respondent practiced law while suspended.
 - c. Respondent failed to provide the State Bar with current street address, telephone number or other current contact information.
 - d. Respondent failed to cooperate and respond to the State Bar's request for information.
 - e. Respondent knowingly failed to respond to a lawful demand for information from the State Bar.
 - f. Respondent failed to furnish information to, or respond promptly to, an inquiry from the State Bar.

ABA STANDARDS

39. ABA *Standard* 3.0 provides that four criteria should be considered: (1) the duty violated; (2) the lawyer's mental state; (3) the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of aggravating and mitigating factors.

The Duty Violated

40. The Hearing Officer finds that Respondent violated his duty to his clients as well as his duty to the profession, with the intent to obtain a benefit for himself.
41. The Hearing Officer considered ABA *Standard* 1.3 set forth under the Theoretical Framework in the *Standards* (last paragraph) and it states that: "The ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct among a number of violations; it might well be and generally should be greater than the sanction for the most serious misconduct."
42. *Standard* 7.1, Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.
43. *Standard* 5.11, Disbarment is generally appropriate when:
- (b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

44. *Standard 4.41*, Disbarment is generally appropriate when:

(b) a lawyer knowingly fails to perform services for a client, and causes serious or potentially serious injury to a client.

The Lawyers Mental State

45. While there might be a question of whether Respondent performed his services for the Farmers (Count Two) before or after his suspension on May 20, 2005, Transcript of Hearing ("T/H") 8:1-12, there is no question of the fact that Respondent knew that he was suspended when he prepared the King Will (Count One) and when he represented the Mosengs (Count Three). In Count Two, Respondent did not prepare the trust documents for which he had been paid, and must have known that he did not do what he was paid to do. Therefore, it is the conclusion of this Hearing Officer that Respondent acted with a "knowing" state of mind in all three Counts.

The Injury Caused

46. The Hearing Officer finds that there were actual injuries in Count Two and Count Three. In Count Two, Mr. Farmer did not receive his original documents or the Trust documents, and in Count Three, the Mosengs had to hire another attorney to complete the work that Respondent was hired and paid to do. Marked as Exhibit 1 to the Aggravation/Mitigation hearing was Mr. Farmer's certified copies of the checks he paid Respondent. Marked as Exhibit 2 to the Aggravation/Mitigation hearing was the Mosengs' billing statement and a copy of the check they paid Respondent. At the very least, Respondent owes the Farmers \$1,100, and the Mosengs \$1,081.87.

Aggravating and Mitigating Factors

Aggravating Factors:

47. *Standard 9.22(a)* prior disciplinary offenses: SB-05-0165-D (February 7, 2006). Respondent was suspended for six months and one day, ordered to pay restitution of \$250 and costs and expenses of the disciplinary proceedings in the amount of \$2,441 with interest at the legal rate. This case involved five counts. The first and third cases involved Respondent dispersing funds from his client trust account when the offsetting funds were not on deposit, which resulted in the shortage in the account. Respondent failed to maintain complete client trust account records, failed to keep his funds separate from those of his clients on deposit, failed to only disperse funds with pre-numbered checks, and failed to conduct monthly reconciliations of the client trust account. During the investigation, Respondent repeatedly failed to respond to the State Bar's records examiner.
48. In the second case, Respondent was hired to complete garnishment proceedings in two cases and to prepare a complaint in a third case. Thereafter, Respondent failed to reasonably communicate with his client, failed to complete the work he had agreed to complete, and failed to respond to the client's requests for an accounting, records or a refund of attorney's fees.
49. The fourth case involved eight former clients that Respondent represented while employed at a firm. After he left the firm and became a sole practitioner, Respondent attempted to change statutory agent information for two separate LLC's, signing on behalf of the clients without their knowledge or consent, and billing them for the work. Respondent also deposited client checks made payable

to his former firm in to his new client trust account. Respondent failed to complete work for which he was hired, failed to reasonably communicate with clients and, in a probate matter, failed to timely disperse an estate distribution to a beneficiary for two years.

50. In the fifth case, Respondent personally notarized witness signatures on trust documents. Respondent's notary commission was invalid, having expired over a year before. Respondent then changed the date of expiration on the notary stamp to 2007 from 2003.
51. In the prior cases four aggravating factors were found: prior disciplinary offenses, a pattern of misconduct, multiple offenses and bad-faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency. One mitigating factor was found: personal and emotional problems. Respondent was found to have violated Rule 42, Ariz.R.Sup.Ct., ERs 1.2, 1.3, 1.4, 1.5, 1.15, 1.16(d), and 3.2, 8.1(b) and 8.4(d), and Rules 43(a) and (d), 44(a) and 53(d) and (f).
52. In File No. 00-1515, Respondent's probation for violating ERs 3.1, ended on February 12, 2003.²
53. *Standard 9.22(b)* dishonest or selfish motive; Respondent was collecting money without doing the work.
54. *Standard 9.22(c)* pattern of misconduct; Respondent failed to respond to the State Bar, which also occurred in SB-05-0165-D, and in each case, Respondent held himself out as an active attorney, when he was actually suspended.

² This probation involved Respondent being placed on probation, and as a condition of his probation, being ordered to pay attorney fees and costs in a civil action.

55. *Standard* 9.22(d) multiple offenses; this matter involves three separate cases.
56. *Standard* 9.22(e) bad-faith obstruction of the disciplinary proceedings by intentionally failing to comply with the rules or orders of the disciplinary agency; Respondent failed to respond to the State Bar and/or failed to keep his address current with Membership.
57. *Standard* 9.22(i) substantial experience in the practice of law; Respondent was admitted May 21, 1999.

Mitigating Factors

58. No evidence was presented of any mitigating factors and this Hearing Officer could find none to exist in this case.

PROPORTIONALITY ANALYSIS

59. The Supreme Court has held that one of the goals of attorney discipline should be to achieve consistency when imposing discipline. It is also recognized that the concept of proportionality is "an imperfect process" because no two cases are ever alike, *In re Struthers*, 179 Ariz. to 16, 887 P.2d 789 (1994), *In re Wines*, 135 Ariz. 203, 660 P.2d 454 (1983). In order to achieve internal consistency, it is appropriate to examine sanctions imposed in cases that are factually similar, *In re Peasely*, 208 Ariz. 90, 90 P.3d 772 (2004). It is also the goal of attorney discipline that the discipline imposed be tailored to the individual case and that neither perfection nor absolute uniformity can be achieved, *Peasely* supra.
60. In this case, the State Bar is recommending a sanction of disbarment.

61. *In re May*, SB-09-0036-D (6/29/09), Respondent was disbarred and ordered to pay restitution. While summarily suspended for failure to comply with MCLE requirements, May engaged in the unauthorized practice of law. May failed to provide competent representation, failed to diligently represent or communicate with clients, failed to earn fees that were paid to him by clients, and virtually abandoned his clients. May further failed to respond or cooperate with the State Bar's investigation. May violated ER's 1.1, 1.12(a), 1.3, 1.4(a) & (b), 1.5(a) & (b), 1.15(a) & (c) & (d), 1.16(d), 3.2, 4.1(a), 4.4(a), 5.5(a) & (b), 8.1(b), 8.4(d), and Rules 31(a)(2)(B), 31(b) & (c), 32(c)(3), 41(c) & (g), 53(d) & (f) and 72. All of these violations were admitted by default. In aggravation, the following factors were found: 9.22(a) (b) (c) (e) (h) (i) & (k). No mitigating factors were found. The mental state found was "intentional", and there was actual as well as potential injury.
62. *In re Mikal*, SB-09-0020-D (4/20/09), Respondent was disbarred and ordered to pay restitution. In multiple counts, Mikal failed to communicate with and diligently represent his clients. Mikal failed to perform services for his clients and failed to adhere to the rules and guidelines regarding his client trust account, including conversion of client property for his own benefit. Mikal further failed to advise the court, his clients and opposing counsel of his suspension, engaged in the unauthorized practice of law while suspended, ignored a court order to appear and failed to respond or cooperate with the State Bar's inquiries. Mikal violated ERs 1.3, 1.4(a)(3) & (a)(5), 1.5, 3.4(c), 4.4(a), 5.5(b)(2), 8.1(b), 8.4(c) & (d) and Rules 43(d)(1)(a), (d)(3) & (d)(4), 53(d) & (f), 72(a)(1), (a)(3), (a)(4) & (b). All of

these violations were admitted by default. In aggravation, the following factors were found: 9.22(b) (c) (d) (e) (g) (i) (j) & (k). The following mitigating factor was found: 9.32(a). Respondent's mental state was found to be "knowing", and there was actual injury to the client.

63. In *In re Morrison*, SB-08-0096-D (9/3/08), Respondent was disbarred and ordered to pay restitution. In multiple counts, Morris failed to communicate with and diligently represent his clients. Morris failed to perform services for his clients and failed to adhere to the rules and guidelines regarding his client trust account, including conversion of client property for his own benefit. Morris further failed to advise the court, his clients and opposing counsel of his suspension, engaged in the unauthorized practice of law while suspended, ignored a court order to appear and failed to respond or cooperate with the State Bar's inquiries. Morris was found to have violated ERs 1.3, 1.4(a)(3) & (a)(5), 1.5, 3.4(c), 4.4(a), 5.5(b)(2), 8.1(b), 8.4(c) & (d) and Rules 43(d)(1)(a), (d)(3) & (d)(4), 53(d) & (f), 72(a)(1), (a)(3), (a)(4) & (b). All of these violations were deemed admitted by default. In aggravation: 9.22(b) (c) (d) (e) (g) (i) (j) & (k). In mitigation: 9.32(a). Respondent's mental state was found to be "knowing", and there was actual injury.

RECOMMENDATION

64. The purpose of lawyer discipline is not to punish the lawyer, but to protect the public and deter future misconduct, *In re Fioramonti*, 176Ariz. 182, 859 P.2d 1315 (1993). It is also the objective of lawyer discipline to protect the profession and the administration of justice, *In re Neville*, 147 Ariz. 106, 708 P.2d 1297

(1985). Yet another purpose is to instill public confidence in the Bar's integrity, *Matter of Horwitz*, 180 Ariz. 20, 881 P.2d 352 (1994).

65. Unfortunately, Respondent has shown the Court and his profession that he no longer cares about following the rules of our profession. Respondent not only continued to practice law after he had been suspended, he completely ignored the State Bar's attempts to contact him and get him to participate in these proceedings. Respondent's conduct is a blatant offense to the standards by which lawyers, as professionals, live by. When those that are charged with upholding the rule of law intentionally and knowingly violate the rules, they forfeit any claim to legitimacy, the right to call themselves an attorney at law, and their license to do so. Multiple aggravating factors have been found, and no mitigating factors. The proportionality cases and the integrity of his profession call for the Respondent to be disbarred. Therefore, it is the recommendation of the undersigned, that Respondent be disbarred and that he:

- 1) Pay Mr. Farmer \$1,100 and the Mosengs \$1,081.87 in restitution;
- 2) Pay all costs and expenses incurred by the State Bar, the Disciplinary Clerk and the Supreme Court in these proceedings.

DATED this 13th day of November, 2009.

H. Jeffrey Coker/ UDA
H. Jeffrey Coker, Hearing Officer

Original filed with the Disciplinary Clerk
this 13th day of November, 2009.

Copy of the foregoing mailed
this 13 day of November, 2009, to:

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Respondent
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4225 East Camelback Road, Suite 11
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Alternate Address:
Mark L. Johnson
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by: Deann Barker